Backgrounder

# U.S. LEGISLATIVE PROTECTION FOR PUBLIC SECTOR WHISTLEBLOWERS



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*LAW AND GOVERNMENT DIVISION*
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# U.S. LEGISLATIVE PROTECTION FOR PUBLIC SECTOR WHISTLEBLOWERS

## INTRODUCTION

In the United States, there has been growing support for the protection of employees who act in the public interest by disclosing conduct by their employers that constitutes a breach of law or regulations, or that is otherwise contrary to public policy. A number of federal and state statutes have been enacted to promote such employee disclosure of information, which is known as "whistleblowing." Some statutes provide general protection against retaliation for certain employees who blow the whistle while others provide protection for employees exercising rights conferred by the specific statutes.

This paper is limited to a discussion of U.S. statutory protection (federal and state) for whistleblowers in the public sector. The paper also refers briefly to the present situation in Canada, where there is a lack of both the federal and provincial legislation protecting public sector whistleblowers. Finally, the paper refers to the Ontario Law Reform Commission recommendations for legislative protection for that province's public sector employees, modelled to some extent on the system in force at the federal level in the United States.

## U.S. CONSTITUTIONAL PROTECTION

As a result of the 1968 U.S. Supreme Court decision in the case of Pickering v. Board of Education,(1) U.S. government employees who

(1) 391 U.S. 563 (1968).

blow the whistle may derive some protection from the first amendment to the U.S. Constitution by relying on the balancing test set out in that case. That test requires a court to weigh the employee's interest, as a citizen, in free speech, and the public interest in such disclosure, against the resulting disruption to the operation and efficiency of the workplace.

Commentators have, however, suggested that the protection for a public sector employee is far from clear, particularly in cases which involve criticism of immediate superiors, or of a fellow employee with whom the whistleblower works in a confidential or policy-making position.(2)

Also, the rights of federal employees under the first amendment were severely restricted by the U.S. Supreme Court decision in Bush v. Lucas.(3) Essentially, as a result of this, if an administrative remedy is available, the federal employee must use that administrative remedy and cannot bring an independent tort action under the first amendment. However, if a federal employee is not covered under the federal administrative scheme (the Federal Civil Service Reform Act of 1978, referred to later), or if the administrative remedy does not cover the alleged retaliation, he or she may be able to use the first amendment.

## U.S. FEDERAL STATUTORY PROTECTION

### A. Specific Statutory Anti-Retaliation Provisions

A number of U.S. federal statutes that create rights for and impose duties upon employees contain protections against discharge or discipline for such employees who disclose wrongdoing by their employers in the exercise or performance of these rights or duties. Employees in both the public and private sectors are protected by such anti-retaliation provisions.

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(2) See, e.g., R. Vaughn, "Statutory Protection of Whistleblowers in the Federal Executive Branch," University of Illinois Law Review, 1982, Vol. 3, pp. 615-667 at p. 639.

(3) 462 U.S. 367 (1983).

Such provisions are primarily found in federal statutes regulating employment. They generally prohibit employment reprisals against employees who complain to a specified public authority about their employer's breach of statutory duties, such as maintenance of safety in the workplace or payment of minimum wages, or against employees who claim a statutory benefit, such as worker's compensation. Examples include the whistleblower provisions in the Occupational Safety and Health Act,(4) the Fair Labour Standards Act,(5) and the Age Discrimination in Employment Act.(6)

As a general rule, these anti-retaliation provisions provide for reinstatement of an employee who has been subject to retaliation, and for compensation for loss of wages and seniority. Such provisions in some statutes also provide for civil sanctions against an employer who takes an employment reprisal, including the imposition of liability for the employee's legal costs and, where appropriate, exemplary damages.

Anti-retaliation provisions also appear in a number of other federal statutes. They are commonly included in environmental legislation, such as the Toxic Substances Control Act,(7) the Water Pollution Control Act,(8) and the Clean Air Act,(9) provisions of which protect any public or private sector employee who discloses potential employer violations of these environmental laws. The relevant provisions in these statutes are virtually identical and provide for an administrative investigation and hearing within the U.S. Department of Labor. Relief includes reinstatement, back pay, compensatory damages, and attorneys' fees. Some of the Acts also provide for the awarding of exemplary damages.

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(4) 29 U.S.C.A., s. 660(c).

(5) 29 U.S.C.A., s. 215.

(6) 29 U.S.C.A., ss. 623(d), 631(a).

(7) 15 U.S.C.A., s. 2622.

(8) 33 U.S.C.A., s. 1367.

(9) 42 U.S.C.A., s. 7622.

## B. Civil Service Reform Act of 1978

While the above statutory provisions offer some protection for public and private sector whistleblowers in the U.S., the protection is generally limited to disclosure of specific statutory breaches. Federal public sector employees who have disclosed or who wish to disclose government wrongdoing are granted much broader protection under the Civil Service Reform Act of 1978,(10) hereinafter referred to as the CSRA. The Act has recently been amended by Public Law 101-12, the Whistleblower Protection Act of 1989,(11) which was signed by President Bush on 10 April 1989 and which takes effect 90 days following that date.

Under the CSRA, a federal public employee who believes that he or she has been subject to a reprisal for whistleblowing may seek relief in one of several ways. First, where the reprisal has been of a serious nature, such as a discharge or demotion, the employee may appeal directly to the Merit Systems Protection Board, established by the Act, alleging that a "prohibited personnel action" has been taken as a reprisal for whistleblowing.(12) Secondly, an employee who is subject to a collective agreement may be entitled to claim the CSRA protection as a defence to disciplinary action by the employer in the context of negotiated grievance procedures.(13) Finally, an employee may file a complaint with the Office

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(10) The Act appears at 5 U.S.C.A., ss. 1201-1222 and 2302. Portions of the following summary of the Act are based on the discussion which appears in: Ontario, Law Reform Commission, Report on Political Activity, Public Comment and Disclosure by Crown Employees, 1986, at pp. 235-242.

(11) A copy of the Act appears in the Congressional Record, U.S. House of Representatives, 21 March 1989, at pp. H740-746.

(12) 5 U.S.C.A., s. 7701. Such an appeal may also allege other forms of "prohibited personnel practices," such as discrimination on the grounds of age, race or sex (s. 2302(b)(1)).

(13) Whistleblowing protection may be provided as a matter of contract. Many collective agreements governing federal public employees incorporate, by reference, as a term of the agreement, the protections established by the CSRA. Other collective agreements reproduce, in the agreement, the specific language of the anti-retaliation provision contained in the CSRA (i.e., 5 U.S.C.A., s. 2302(b)(8)).

of Special Counsel (OSC), also established under the CSRA, which is empowered to investigate the complaint and seek corrective action.(14)

In addition to providing retrospective protection for employees who have been subject to reprisal, the CSRA also creates a mechanism through which a prospective whistleblower, who might otherwise hesitate to make disclosure for fear of reprisal, may make disclosure anonymously to the OSC and thereby ensure that the information is brought to the attention of the appropriate authorities.

It should be noted that the CSRA does not provide protection for all federal public employees. Under the Act, the following positions are excluded:

> (i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
>
> (ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.(15)

In addition, the Act excludes:

> (i) a Government corporation;
>
> (ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof, the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or
>
> (iii) the General Accounting Office.(16)

The Act prohibits an employment reprisal against an employee for a disclosure of information that the employee reasonably believes evidences:

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(14) 5 U.S.C.A., s. 1212.

(15) 5 U.S.C.A., s. 2302(a)(2)(B).

(16) 5 U.S.C.A., s. 2302(a)(2)(C).

(i) a violation of any law, rule or regulation; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.(17)

An "employment reprisal" may be in the form of any "personnel action," which is broadly defined in the Act to include such matters as discharges, performance evaluations, decisions concerning pay benefits and awards and "any other significant changes in duties or responsibilities."(18)

Under the above provision, protection is available to the whistleblower irrespective of to whom the disclosure is made, except in specified instances. Public disclosure of wrongdoing may be made by an employee under the Act as long as it is "not specifically prohibited by law" or is "not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs."(19)

Protected disclosure of government wrongdoing that falls within one of those confidential categories may be made under the Act to the OSC, the Inspector General of an agency,(20) or another employee designated by the head of the agency to receive such disclosures.(21)

As a result of the Whistleblower Protection Act of 1989, the OSC was created as an independent agency rather than as an independent component of the MSPB as it previously was. Its three primary responsibilities remain:

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(17) 5 U.S.C.A., s. 2302(b)(8).

(18) 5 U.S.C.A., s. 2302(a)(2)(A).

(19) 5 U.S.C.A., s. 2302(b)(8)(A).

(20) Under the Inspector General Act of 1978, P.L. 95-492, 92 Stat. 1101 (1978) as amended, Congress created a mechanism for the establishment within each agency of government of an "Inspector General" who would be charged with the internal investigation of complaints and allegations made by employees of that agency.

(21) 5 U.S.C.A., s. 2302(b)(8)(B).

(1) the investigation of allegations of activities prohibited by civil service law, rule or regulation, primarily allegations of prohibited personnel practices as defined in the CSRA and, if warranted, the initiation of a disciplinary or a corrective action;

(2) the provision of a "secure channel" through which allegations of waste, fraud, mismanagement, illegality, abuse of authority, or a substantial and specific danger to public health or safety may be made without fear of retaliation and without disclosure of identity except with the employee's consent; and

(3) the enforcement of the Hatch Act, which restrains partisan political activities of civil servants.(22)

Whistleblowing constitutes only a small portion of the matters that are directed to the OSC.

As a result of the 1989 amendments, the CSRA requires the Special Counsel to maintain the anonymity of a federal public employee who blows the whistle to him/her, unless the employee consents to disclosure of his/her identity or "unless the Special Counsel determines that disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law."(23) Previously the Act provided that the identity of the whistleblower could not be disclosed without his/her consent unless the Special Counsel determined that the disclosure of the identity of the whistleblower was "necessary in order to carry out the functions of the Special Counsel." It was apparently felt that to retain this provision could have seriously undermined efforts to encourage whistleblowers to come forward with disclosures. It would be unrealistic to expect whistleblowers to volunteer information if they risked the disclosure of their names and possible retaliation.

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(22) "Report of the Office of the Comptroller General," in Hearings before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service, House of Representatives, 1st Session, 99th Congress (1985), Serial No. 99-19, pp. 30-31, as cited in: Ontario, Law Reform Commission, Report on Political Activity, Public Comment and Disclosure by Crown Employees, 1986, at p. 238.

(23) 5 U.S.C.A., s. 1213(h).

The Special Counsel, on receiving information from a federal employee, must determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety. If he/she decides there is such a likelihood, the information must be promptly transmitted to the appropriate agency head, who must investigate the matter and submit a written report regarding the alleged wrongdoing within a prescribed time.(24)

The written report must be reviewed and signed by the agency head, and must include the following information:

(1) a summary of the information with respect to which the investigation was initiated;

(2) a description of the conduct of the investigation;

(3) a summary of any evidence obtained from the investigation;

(4) a listing of any violation or apparent violation of any law, rule or regulation; and

(5) a description of any corrective action taken or planned as a result of the investigation, such as
(A) changes in agency rules, regulations or practices;
(B) the restoration of any aggrieved employee;
(C) disciplinary action against any employee; and
(D) referral to the Attorney General of any evidence of a criminal violation.(25)

The agency is not, however, authorized to disclose information that is specifically prohibited from disclosure by "any other provision of law" or specifically required by Executive Order to be kept secret in the interest of national defence or the conduct of foreign affairs.(26)

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(24) 5 U.S.C.A., s. 1213(c)(1).

(25) 5 U.S.C.A., s. 1213(d).

(26) 5 U.S.C.A., s. 1213(i).

The agency's report must be submitted to the Special Counsel, who must in turn transmit a copy of it to the complainant whistleblower, unless it contains evidence of a criminal violation that has been referred to the Attorney General.(27) The complainant may also submit comments to the Special Counsel on the agency report within a prescribed time.(28) The Special Counsel must review the report and determine whether the findings of the agency head appear reasonable and whether the report contains the required information set out above.(29) The Special Counsel must then transmit the report, together with any comments provided by the complainant whistleblower and any appropriate comments or recommendations by the Special Counsel to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General.(30)

Should the agency head fail to submit the report within the prescribed time, the Special Counsel must then transmit a copy of the information which has been sent to the agency head, to the President, the congressional committees with jurisdiction over the relevant agency, and the Comptroller General along with a statement noting the failure of the head of the agency to file the required report.(31)

The Special Counsel must maintain and make publicly available a list of those matters, other than criminal matters, that have been referred to agency heads and of reports by those heads. The Special Counsel must also take steps to ensure that the public list does not contain any information prohibited by law or Executive Order.(32)

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(27) 5 U.S.C.A., s. 1213(e)(1).

(28) Ibid.

(29) 5 U.S.C.A., s. 1213(e)(2).

(30) 5 U.S.C.A., s. 1213(e)(3).

(31) 5 U.S.C.A., s. 1213(e)(4).

(32) 5 U.S.C.A., s. 1219.

Where the Special Counsel determines that there are reasonable grounds to believe that a prohibited reprisal has occurred, exists, or is to be taken, and requires corrective action, he/she must report this to the MSPB, the agency involved and the Office of Personnel Management, together with any findings or recommendations. He or she may also report such determination, findings and recommendations to the President. In the report, the Special Counsel may include recommendations for corrective action.(33) If, after a reasonable time, the agency has not taken that corrective action, the Special Counsel may petition the MSPB to do so.(34)

The 1989 amending legislation (Public Law 101-12) was the result of a compromise between Congress and the Bush Administration. President Reagan had unexpectedly vetoed a similar measure, Bill S508, on 27 October 1988 after the bill had passed by 418 votes to nil in the House of Representatives and by voice vote in the Senate. Since President Reagan vetoed the bill after the end of the congressional session, there was no opportunity for a vote in Congress to override his veto.

The main reason for the Whistleblower Protection Act of 1989 and the earlier Bill S508 was to eliminate two categories of impediments which had made it difficult for federal whistleblowers and other victims of prohibited personnel practices to win redress. One category included restrictive MSPB and federal court decisions. Specific provisions of the amending Act modify or overturn inappropriate administrative or judicial determinations and make it more likely that whistleblowers and other victims of prohibited personnel practices will win their cases.

The second category of impediments included those due to the policies of the OSC as based on the Special Counsel's view of its role. The clear intent of the Civil Service Reform Act of 1978 was that the Special Counsel should protect and defend the rights of employees who are victims of prohibited personnel practices. Nevertheless, the OSC had determined that its role was to protect the merit system.

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(33) 5 U.S.C.A., s. 1214(b)(2)(A).

(34) 5 U.S.C.A., s. 1214(b)(2)(B).

The two divergent views of the role of the OSC do not conflict in most cases. However, it was noted that the Special Counsel's view had led to instances in which the Special Counsel had acted to the actual detriment of employees seeking help from that Office. Hence, the Whistleblower Protection Act of 1989 makes clear its purpose as follows:

> The purpose of this Act is to strengthen and improve protection for the rights of federal employees, to prevent reprisals, and to help eliminate wrongdoing within the government by:
> (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and
> (2) establishing:
> (A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;
> (B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and
> (C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.(35)

A major change resulting from the above legislation was to establish the OSC as an independent agency rather than as a branch of the MSPB, as it previously was.

The 1989 amending legislation also makes it easier for a U.S. federal whistleblower (or the Special Counsel acting on the individual's behalf) to prove that a whistleblower reprisal has taken place. The legislation lowers the burden of proof for federal whistleblowers who have suffered reprisals, while raising the burden of proof for federal agencies defending their personnel decisions. The federal employee must prove by a preponderance of evidence that the whistleblowing was a contributing factor

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(35) Whistleblower Protection Act of 1989, s. 2.

in the employment reprisal.(36) This test is specifically intended to overrule case law which required a whistleblower seeking redress to prove that his protected conduct was a "significant," "motivating," "substantial" or "predominant" factor in an employment reprisal. If a whistleblower proves that whistleblowing was a contributing factor in such reprisal, the agency would have to demonstrate by "clear and convincing evidence" that it would have taken the same action in the absence of the whistleblowing.(37) "Clear and convincing evidence" is a higher standard than the "preponderance of evidence" standard previously used and which applies in most civil matters in American courts.

One of former President Reagan's concerns about Bill S508 was a provision that would have authorized the Special Counsel to obtain judicial review of most decisions of the MSPB in proceedings to which the Special Counsel is a party. Implementation of this provision, said the President, would place two Executive branch agencies before a federal court for resolution of a dispute between them. He stated that such litigation of intra-Executive branch disputes would conflict with the constitutional grant of the Executive Power to the President, which includes the authority to supervise and resolve disputes between his subordinates. He was also concerned that permitting the Executive branch to litigate against itself would conflict with the constitutional provisions to limit the exercise of the judicial power of the United States to actual cases or controversies between parties with concretely adverse interests.

The Attorney General, who had recommended President Reagan's veto in 1988, helped shape the compromise in the Whistleblower Protection Act of 1989, to alleviate some of the administration's concerns.

In addition to, among other things, clarifying the standard of proof for federal whistleblowers and employers, the Whistleblower Protection Act of 1989 also prevents the Special Counsel from appealing adverse decisions of the MSPB in federal court. This safeguard was included in the compromise to allay administration fears of having the

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(36) 5 U.S.C.A., s. 1221(e)(1).

(37) 5 U.S.C.A., s. 1221(e)(2).

federal government sue itself - an action the Attorney General believed to be unconstitutional. As a result of the compromise, Special Counsel is also prohibited from opposing a whistleblower in cases before the MSPB and is prevented from disclosing the name of a whistleblower unless it is necessary to protect the public health and safety.

## EXAMPLES OF U.S. STATE LEGISLATION

At the state level, as at the federal level, a number of statutes contain anti-retaliation provisions protecting both public and private sector employees who complain to a specified public authority about breaches of their employers' statutory duties. Such provisions are most commonly found in employment statutes.

At present, at least 10 states have also enacted broad legislative provisions specifically designed to protect public sector whistleblowers. Those states are: Delaware, Indiana, Kansas, Kentucky, Maryland, Oregon, Texas, Utah, Washington and Wisconsin. At least another 10 states have enacted general legislation protecting both public and private sector whistleblowers; those states are: California, Connecticut, Florida, Illinois, Iowa, Louisiana, Maine, Michigan, New Jersey and New York.

For illustrative purposes, the legislative provisions protecting public sector whistleblowers in the states of California, Connecticut, New Jersey and New York will be discussed below.

### A. California

In California, state employees who report improper governmental activities are protected from retaliation by their superiors by provisions in the Reporting of Improper Governmental Activities Act.(38)

This Act states that it is the intent of the California Legislature that "state employees and other persons should disclose, to the

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(38) West's Annotated California Codes, Government Code, ss. 10540-10549.

extent not expressly prohibited by law, improper governmental activities."(39) "Improper governmental activity" is defined as follows:

> "Improper governmental activity" means any activity by a state agency or by an employee which is undertaken in the performance of the employee's official duties, whether or not such action is within the scope of his employment, and which is (1) in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency.(40)

An "employee," for purposes of the Act, is any individual appointed by the Governor or employed or holding office in a state department or agency.(41) The Act defines a "person" as "any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing."(42)

An anti-retaliation provision in the statute provides that:

> (a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to disclose to the Joint Legislative Audit Committee or the Auditor General matters within the scope of this [Act].
>
> (b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action.

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(39) Ibid., s. 10541.

(40) Ibid., s. 10542.

(41) Ibid.

(42) Ibid.

> (c) Any employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.
>
> (d) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.(43)

The Joint Legislative Audit Committee administers the Act through the Auditor General, and has the Auditor General investigate and report those improper governmental activities which it deems appropriate. Nothing precludes the Committee from exercising any authority conferred under the statute.(44)

Upon receiving specific information that any employee or state agency has engaged in an improper governmental activity, the Auditor General must notify the Joint Legislative Audit Committee, which may require the Auditor General to conduct an investigative audit of the matter. In addition, the Committee may direct the Auditor General to investigate incidents of improper governmental activities. The identity of the person providing the information which initiated the audit must not be disclosed without the written permission of that person, unless the disclosure is to a law enforcement agency conducting a criminal investigation.(45)

In conducting an investigative audit, the Committee or the Auditor General may request the assistance of a state department, agency or employee. No information obtained from the Auditor General by any department, agency or employee as a result of the request or any information obtained thereafter as a result of further investigation may be divulged or made known to any person without the prior approval of the Committee.(46)

If the Committee determines that there is reasonable cause to believe that an employee or state agency has engaged in any improper

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(43) Ibid., s. 10543.

(44) Ibid., s. 10544.

(45) Ibid., s. 10545.

(46) Ibid., s. 10546.

governmental activity, it must report the nature and details of the activity to the head of the employing agency, or the appropriate appointing authority. If appropriate, the Committee must report this information to the Attorney General, the policy committees of the Senate and Assembly with jurisdiction over the subject involved, or to any other authority.(47)

Neither the Auditor General nor the Committee has any enforcement power. Where either of them submits a report of alleged improper activity to the head of the employing agency or appropriate appointing authority, that person must report any resulting action taken back to the Committee or Auditor General. The first such report must be transmitted no later than 30 days after the date of the Committee's report and any others must be transmitted monthly thereafter until final action has been taken.(48)

Every investigative audit is to be kept confidential, except that the Committee may issue any report or release any findings that it deems necessary to serve the interests of the state.(49) The above provisions do not limit the authority conferred upon the Attorney General or any other department or agency of government to investigate any matter.(50)

The Act further stipulates that a state employee or applicant for state employment who files a written complaint with his or her supervisor, manager or the appointing authority alleging actual or attempted acts of reprisal, threats, coercion or similar improper acts prohibited by the statute may also file a copy of the complaint with the State Personnel Board, together with a sworn statement that the contents of the complaint are true, or are believed by the applicant to be true, under penalty of perjury. The complaint, if filed with the Board, must be filed within 12 months of the most recent alleged act of reprisal.(51)

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(47) Ibid., s. 10547(a).

(48) Ibid., s. 10547(b).

(49) Ibid., s. 10547(c).

(50) Ibid., s. 10547(d).

(51) Ibid., s. 10548(a).

A person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having disclosed improper governmental activities, is subject to a fine not exceeding $10,000 and imprisonment in the county jail for up to a period of one year. Any state civil service employee who intentionally engages in that conduct must be disciplined as provided for by state law.(52)

In addition to all other specified penalties, such a person is liable in an action for damages brought against him or her by the injured party. The court may award punitive damages where the acts of the offending party are proven to be malicious. Where liability is established, the injured party is also entitled to reasonable attorney's fees as provided by law. However, no action for damages is available to the injured party unless that party has first filed a complaint with the State Personnel Board (as provided for above) and the Board has failed to reach a decision regarding any hearing conducted pursuant to s. 19683.(53)

The Act also states that the above provisions "are not intended to prevent an appointing power, manager or supervisor from taking, directing others to take, recommending, or approving any personnel action or from taking or failing to take a personnel action with respect to any state employee or applicant for state employment if the appointing power, manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has disclosed improper governmental activities..."(54)

Finally, if the State Personnel Board determines that there is a reasonable basis for an alleged violation, or finds an actual violation, of the anti-retaliation provision, it must transmit a copy of the investigative report to the Joint Legislative Audit Committee. All working papers pertaining to the investigative report must be made

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(52) Ibid., s. 10548(b).

(53) Ibid., s. 10548(c).

(54) Ibid., s. 10548(d).

available under subpoena in a civil action brought pursuant to the relevant provision of state law.(55)

**B. Connecticut**

In Connecticut, a provision in the law pertaining to state agencies stipulates that:

> (a) Any person having knowledge of any matter involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency may transmit all facts and information in his possession concerning such matter to the auditors of public accounts.(56)

The section further provides that the auditors of public accounts shall review the matter and report their findings and any recommendations to the Attorney General, who must then make such investigations as he deems proper, being assisted by the auditors. He has the power to summon witnesses, require the production of any necessary books, papers or other documents and administer oaths of witnesses. He is normally required to report his findings to the Governor or, in matters involving criminal activity, to the Chief State's Attorney. The auditors of public accounts and the Attorney General must not disclose the identity of a person giving information without that person's consent, unless they determine that such disclosure is unavoidable during the course of the investigation.(57)

The relevant provision also states that no "state officer or employee" and no appointing authority shall take or threaten to take any personnel action against any state employee in retaliation for such disclosure of information to the auditors of public accounts or the

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(55) Ibid., s. 10549.

(56) Connecticut General Statutes Annotated, West Publishing Co., s. 4-61dd(a).

(57) Ibid.

Attorney General. An employee alleging that such action has been threatened or taken may, within 30 days of learning of the specific incident, file an appeal with the employees' review board or, if he or she is covered by a collective bargaining contract, in accordance with the procedure it provides.(58)

An employee found to have knowingly and maliciously made false charges under the above provision is subject to disciplinary action by his appointing authority up to and including dismissal. Such action is subject to appeal to the employees' review board or, if the employee is included in a collective bargaining contract, the procedure it provides.(59)

For purposes of the above, the definition of "state officers and employees" is as follows:

> "state officers and employees" includes every person elected or appointed or employed in any office, position or post in the state government, whatever his title, classification or function and whether he serves with or without remuneration or compensation, including judges of probate courts and employees of such courts. In addition to the foregoing, "state officers and employees" includes attorneys appointed by the Public Defenders Services Commission as public defenders, assistant public defenders or deputy assistant public defenders, and attorneys appointed by the court as special assistant public defenders, the attorney general, the deputy attorney general and any associate attorney general or assistant attorney general, any other attorneys employed by any state agency, any commissioner of the superior court hearing small claims matters or acting as a fact-finder, arbitrator or magistrate or acting in any other quasi-judicial position, any person appointed to a committee established by law for the purpose of rendering services to the judicial department including, but not limited to, the legal specialization screening committee and the state bar examining committee, and

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(58) Ibid., s. 4-61dd(b).

(59) Ibid., s. 4-61dd(c).

> any physicians or psychologists employed by any state agency.(60)

Another provision, this one contained in Connecticut's labour law, provides as follows:

> (b) No employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action. No municipal employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, to a public body concerning the unethical practices, mismanagement or abuse of authority by such employer. The provisions of this subsection shall not be applicable when the employee knows that such report is false.(61)

A "person" is defined as one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any organized group of persons.(62) An "employer" is defined as a person engaged in business who has employees, including the state and any political subdivision of the state.(63) An "employee" is defined as a person engaged in service to an employer in a business of his employer.(64) The term "public body" has the following meaning:

> (A) any public agency, as defined in subsection (a) of section 1-18a, or any employee, member or officer

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(60) Ibid., s. 4-141.

(61) Connecticut General Statutes Annotated, West Publishing Co., s. 31-51m(b).

(62) Ibid., s. 31-51m(a)(1).

(63) Ibid., s. 31-51m(a)(2).

(64) Ibid., s. 31-51m(a)(3).

> thereof, or (B) any federal agency or any employee, member or officer thereof.(65)

"Public agency," as referred to above, is defined in s. 1-18a as follows:

> "Public agency" or "agency" means any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official or body or committee thereof but only in respect to its or their administrative functions.

Another subsection of the same provision states that an employee who is discharged, disciplined or otherwise penalized by his employer in violation of the anti-retaliatory provision cited above, may, after exhausting all available administrative remedies, bring a civil action, within a specified time, for the reinstatement of his previous job, payment of back wages and reestablishment of employee benefits lost through such violation.(66) This will be done in the superior court for the judicial district where the violation is alleged to have occurred or where the employer has its principal office.

An employee found to have knowingly made a false report is subject to disciplinary action by his employer up to and including dismissal.(67)

The above provision is not to be construed to diminish or impair the rights of a person under any collective agreement.(68)

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(65) Ibid., s. 31-51m(a)(4).

(66) Ibid., s. 31-51m(c).

(67) Ibid.

(68) Ibid., s. 31-51m(d).

### C. New Jersey

In New Jersey, employees who blow the whistle in both the public and private sectors are protected from retaliatory action by the same statutory provisions contained in the Conscientious Employee Protection Act.(69)

The relevant provision states:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
> a. Discloses, or threatens to disclose, to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law;
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer; or
> c. Objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes:
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law;
> (2) is fraudulent or criminal; or
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare.(70)

For purposes of the Act, the following definitions are relevant:

> a. "Employer" means any individual, partnership, association, corporation or any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent and shall include all branches of State Government, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district,

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(69) New Jersey Statutes Annotated, West Publishing Co., Title 34, ss. 34:19-1 to 34:19-8.

(70) Ibid., s. 34:19-3.

or any authority, commission, or board or any other agency or instrumentality thereof.

b. "Employee" means any individual who performs services for and under the control and direction of an employer for wages or other remuneration.

c. "Public body" means:
(1) the United States Congress, and State legislature, or any popularly-elected local governmental body, or any member or employee thereof;
(2) any federal, State, or local judiciary, or any member or employee thereof, or any grand or petit jury;
(3) any federal, State, or local regulatory, administrative, or public agency or authority, or instrumentality thereof;
(4) any federal, State, or local law enforcement agency, prosecutorial office, or police or peace officer;
(5) any federal, State, or local department of an executive branch of government; or
(6) any division, board, bureau, office, committee, or commission of any of the public bodies described in the above paragraphs of this subsection.

d. "Supervisor" means any individual with an employer's organization who has the authority to direct and control the work performance of the affected employee, who has authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains, or who has been designated by the employer on the notice required under section 7 of this Act.

e. "Retaliatory action" means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.(71)

The Act states that protection against retaliatory action for disclosure to a public body must not apply to an employee unless the employee has first brought the relevant activity, policy or practice to the

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(71) Ibid., s. 34:19-2.

attention of a supervisor by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice. Under the Act, where the situation is urgent, such disclosure to the supervisor would not be required if the employee was reasonably certain that the activity, policy or practice was known to one or more supervisors or if the employee reasonably feared physical harm as a result of the disclosure.(72)

If any of the provisions of the Act are violated, an aggrieved employee or former employee may institute a civil action in a court of competent jurisdiction, within one year. The court may order relief, which may include the following:

> a. An injunction to restrain continued violation of this act;
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> b. The reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position;
>
> c. The reinstatement of full fringe benefits and seniority rights;
>
> d. The compensation for lost wages, benefits and other remuneration;
>
> e. The payment by the employer of reasonable costs, and attorney's fees;
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> f. Punitive damages; or
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> g. An assessment of a civil fine of not more than $1,000.00 for the first violation of the act and not more than $5,000.00 for each subsequent violation, which shall be paid to the State Treasurer for deposit in the General Fund.(73)

A court may also award reasonable attorney's fees and court costs to an employer if it determines that an action brought by an employee under the Act was without basis in law or in fact. The same section

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(72) Ibid., s. 34:19-4.

(73) Ibid., s. 34:19-5.

provides, however, that an employee would not be assessed attorney's fees if, after exercising reasonable and diligent efforts after filing a suit, he or she filed a voluntary dismissal of the employer, within a reasonable time of the determination that the employer would not be found liable for damages.(74)

Another provision requires that the employer conspicuously display notices of its employees' protections and obligations under the Act, and use other appropriate means to keep its employees informed. Each posted notice must include the name of the person(s) designated by the employer to receive written notifications pursuant to the Act.(75)

Finally, the Act stipulates that nothing in it shall be deemed to diminish the rights, privileges or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employment contract, except that the institution of an action in accordance with the Act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law.(76)

### D. New York

In New York State, the relevant legislative provision protecting public sector whistleblowers states as follows in paragraph (a):

> (a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. "Improper governmental

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(74) Ibid., s. 34:19-6.

(75) Ibid., s. 34:19-7.

(76) Ibid., s. 34:19-8.

> action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation.(77)

Paragraph (b) states that prior to disclosing information pursuant to paragraph (a), an employee must have made a good effort to provide the appointing authority with the information and to have given it a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety. An employee who acts pursuant to paragraph (b) is deemed to have disclosed information to a governmental body under paragraph (a).

The following are the relevant definitions for purposes of the above provision:

> 1. For the purposes of this section, the term:
>
> (a) "Public employer" or "employer" shall mean (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission or public benefit corporation, or (vi) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state.
>
> (b) "Public employee" or "employee" shall mean any person holding a position by appointment or employment in the service of a public employer except judges or justices of the unified court system and members of the legislature.
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> (c) "Governmental body" shall mean (i) an officer, employee, agency, department, division, bureau, board, commission, council, authority or other body of a public employer, (ii) employee, committee, member, or

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(77) New York Consolidated Laws Service, The Lawyers Co-operative Publishing Co., Civil Service Law, s. 75-b(2)(a).

> commission of the legislative branch of government, (iii) a representative, member or employee of a legislative body of a county, town, village or any other political subdivision or civil division of the state, (iv) a law enforcement agency or any member or employee of law enforcement agency, or (v) the judiciary or any employee of the judiciary.
>
> (d) "Personnel action" shall mean an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance.(78)

An employee subject to dismissal or other disciplinary action under a final and binding arbitration provision, or other disciplinary procedure in a collectively negotiated agreement, or under provision of New York State or local law, may assert as a defence before the designated arbitrator or hearing officer that he or she reasonably believes the disciplinary action would not have been taken but for the whistleblowing. The merits of this argument must be determined as part of the arbitration award or hearing officer decision. If there is a finding that the disciplinary action was based solely on employer violation of the anti-retaliation provision, the arbitrator or hearing officer must dismiss or recommend dismissal of the disciplinary proceeding. If appropriate, the employee will be reinstated with back pay, or, in the case of an arbitration procedure, may take other action permitted in the collective agreement.(79)

An employee, whose collective agreement prohibits the employer from taking adverse retaliatory personnel actions and provides for a final and binding arbitration to resolve alleged violations of such provisions, may assert before the arbitrator that he or she reasonably believes that the action would not have been taken but for the whistleblowing. If the arbitrator determines the adverse personnel action was based on a violation by the employer of the anti-retaliatory provision,

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(78) Ibid., s. 75-b(1).

(79) Ibid., s. 75-b(3)(a).

he/she may take such remedial action as is permitted by the collective agreement.(80) Where an employee is not subject to the above provision, he or she may commence an action in a court of competent jurisdiction under specified terms and conditions.(81)

Finally, the legislation provides that nothing in these provisions shall diminish or impair the rights of a public employee or employer under any law, rule, regulation or collective agreement or prohibit any personnel action which would have been taken regardless of the disclosure of information.(82)

## CANADA

At present, there is no federal or provincial legislation in Canada that provides the same broad protection for public sector whistle-blowers as in the United States at the federal level and in some of the states.

There are a number of Canadian federal and provincial statutes, most notably those pertaining to employment or environmental matters, which protect employees within the Act's jurisdiction against retaliation for exercising rights conferred by the statute. For example, a provision in the Canadian Environmental Protection Act(83) stipulates that:

> 58.(1) Where a person has knowledge of the occurrence or reasonable likelihood of a release into the environment of a substance in contravention of a regulation made under section 54, but the person is not required to report the matter under this Act, the person may report any information relating to the release or likely release to an inspector or to such person as is designated by the regulations.

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(80) Ibid., s. 75-b(3)(b).

(81) Ibid., s. 75-b(3)(c).

(82) Ibid., s. 75-b(4).

(83) S.C. 1988, c. 22.

> (2) A person making a report under subsection (1) may request that the person's identity and any information that could reasonably reveal the identity not be released.
>
> (3) Where a person makes a request under subsection (2), no person shall release or cause to be released the identity of the person making the request or any information that could reasonably be expected to reveal the identity, unless the person making the request authorizes the release in writing.
>
> (4) Notwithstanding any other Act of Parliament, no employee of a department, board or agency of the Government of Canada, or of a corporation to which any regulations made under section 54 apply, shall be disciplined, dismissed or harassed for making a report under this section or section 57.

For the most part, public sector employees who blow the whistle in Canada are forced to rely on the protection offered by the common law. At common law, an employee owes his or her employer the general duties of loyalty, good faith and, in appropriate circumstances, confidentiality.(84) Loyalty embraces the obligation to perform assigned work diligently and skilfully, to refrain from any sort of deception related to the employment contract, to avoid any relationships, remunerative or otherwise, giving rise to an interest inconsistent with that of the employer, and to conduct oneself at all times so as not to be a discredit to one's employer.(85) The duty of good faith requires an employee to perform assigned tasks according to the best interests of his or her employer.(86) Finally, an employee may be under a duty to keep certain

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(84) Ontario Law Reform Commission, Report on Political Activity, Public Comment and Disclosure by Crown Employees, Ministry of the Attorney General, 1986, p. 35.

(85) Ibid.

(86) Ibid., p. 36.

information confidential until released from that duty by the employer. This duty may arise by contract, or it may be imposed by equity on an employee whenever the employer entrusts to him or her "confidential" information on the understanding that such information is not to be disclosed without authorization. A general duty of confidentiality may arise by virtue of a particular relationship between the employer and the employee.(87)

An employee may feel compelled to breach these duties and to reveal a confidence or some information, believing that to do so is in the public interest. When such a breach occurs, employers routinely take disciplinary actions which may, of course, include dismissal. In the face of such punishment, some employees have sought protection from the courts or, if they were governed by a collective agreement, through a grievance procedure.

The courts have permitted a very limited "public interest" defence in these cases when the wrongdoing has been serious and the public's interest in disclosure is clear. They have emphasized the need for the employees to use internal remedies first, to be sure of their facts and to exercise good judgment in their actions. Arbitrators have applied similar criteria. In general, it may be said that the range of protection for employees is narrow and that they may seriously jeopardize their careers when they breach their duties to their employers.

A government employee owes the same duties of loyalty, good faith and confidentiality as do employees of other employers; this may conflict with the public interest in open government, the proper expenditure of public money, public health and so on.

In a report(88) released in 1986, the Ontario Law Reform Commission (OLRC) concluded that government employees should not have to rely on the limited common law "public interest" defence alone if they are

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(87) Ibid.

(88) Ontario Law Reform Commission, Report on Political Activity, Public Comment and Disclosure by Crown Employees, Ministry of the Attorney General, 1986.

disciplined for whistleblowing but rather should be given statutory protection. More important, they should have access to a system whereby they could make their revelations in confidence to an impartial third party, have them investigated and made public if warranted.

The OLRC recommended the creation of an Office of Special Counsel (OSC) modelled to some extent on the system in effect for U.S. federal employees and discussed earlier in this paper. The OSC would serve to legitimize disclosure of serious government wrongdoing. Government employees would be protected from retaliatory action if they revealed information that ought in the public interest to be disclosed, or a violation of any law or regulation, mismanagement, waste of funds, abuse of authority, danger to health or safety, and other similar wrongdoing.

Briefly, the OSC procedure would operate as follows:

- a concerned employee would disclose the information in confidence to the Special Counsel;
- if the Counsel felt the information constituted evidence of government wrongdoing that ought to be disclosed in the public interest, he or she would request a report from the agency concerned;
- the report would be due in 30 days, or earlier if necessary;
- the agency report and the employee's information would be placed in a public file if the Counsel felt there was evidence of wrongdoing, unless making the information public would prejudice any police or other investigation;
- if the agency argued that the information required for its report was confidential, the Counsel could apply to a court for an order to release it; the court would weigh the public interest in disclosure against the asserted need for confidentiality.

Finally, in addition to the role just described, the Special Counsel would be available to give employees a preliminary opinion as to whether government wrongdoing had taken place. Employees could bypass the Special Counsel procedure and take their chances with the common law defence if disciplined, but the OLRC expected that the Special Counsel procedure would be used in most cases.